No. 75-1303

In the Supreme Court of the United States

OCTOBER TERM, 1976

QANTAS AIRWAYS LIMITED, PETITIONER

v.

FOREMOST INTERNATIONAL TOURS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

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This Memorandum is filed in response to the Court's order of May 3, 1976, inviting the Solicitor General to express the views of the United States.

STATEMENT

The relevant facts, proceedings below, statutory provisions, and related Board orders are fully set forth in the papers already filed by the parties. Accordingly, we refer to those materials and limit this statement to the following observations.

1. In 1974 Foremost sued Qantas for violating Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, in connection with the arrangement and marketing ("packaging") of inclusive tours to South Pacific destinations.

The term "inclusive tour" refers to a tour which includes air transportation on a regularly scheduled flight, plus such land services as hotel accommodations, local

transportation, and sight-seeing trips.[1] Typically, the ground package is offered in combination with a "tour-basing" air fare that is lower than the regular economy fare, and availability of the reduced rate air transportation is conditioned upon purchase of the ground package.[2] The justification for this "promotional" fare is that it attracts passengers who would not use scheduled services if forced to pay the regular fare.

The tariff of an air carrier offering a tour-basing fare must include not only the air fare, but also the requirement that a ground package be purchased. Usually the tariffs containing tour-basing fares also set forth a minimum price for the ground package, as well as the kinds of services comprising the package, and a departure from the tariff terms could violate Sections 403, 404 and/or 411 of the Federal Aviation Act.[3] Since the Board has

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[1]Inclusive tours must be distinguished from inclusive tour *charters*. The charter flights are arranged by a tour operator who charters an aircraft from an air carrier and then, as a principal, sells seats to the general public as part of a package consisting of air transportation and land arrangements. By definition, inclusive tour charters do not involve scheduled service. See *American Airlines* v. *Civil Aeronautics Board*, 365 F. 2d 939 (C.A.D.C.). The Board regulates inclusive tour charters substantially. See 14 C.F.R. 378.2(d) and (d-1), 378.10(a), 378.16, 378a.2, paras. 8 and 11, and 378a.25(a)(1). Despite the similarity of the names and the fact that the same individuals and corporations may be tour operators for both inclusive tour packages and inclusive tour charters, Foremost's complaint focuses solely on the former activities, and only they are involved in this case.

[2]The ground package is usually but not always arranged by a "tour operator" independent of the carrier.

[3]Section 403(b), 49 U.S.C. 1373(b), requires adherence to tariffs; Section 404(b), 49 U.S.C. 1374(b), prohibits unfair preferences and undue discriminations; and Section 411, 49 U.S.C. 1381, forbids unfair or deceptive practices and unfair methods of competition in air transportation or the sale thereof.

power to enforce these provisions, the ground tour is in this limited sense regulated by the Board.

Unlike the air fare itself, however, the ground package is not regulated under the ratemaking provisions of the Act. The Board does not evaluate the ground package in terms of such standard ratemaking criteria as costs, value of service, and the like but instead focuses on the tour-basing fare itself.[4] Similarly, except in the respects already indicated, the Board does not otherwise regulate the business of selling "inclusive tours."

2. Foremost, a corporation engaged in the packaging of inclusive tours to the South Pacific, alleged in its complaint that Qantas began its unlawful course of action in November 1973, when it ceased a long-standing affiliation with Foremost in packaging inclusive tours and began marketing South Pacific inclusive tours through an "in-house" tour department known as Qantas Holidays. Foremost charged that Qantas distributed promotional materials substantially similar to those used by Foremost; promoted and sold tours to the South Pacific which

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[4]To use an extreme illustration, assume a regular economy fare of $800, and a tariff showing a tour-basing fare of $400 tied to a minimum ground package of $10. Many passengers who would otherwise pay the regular fare would obviously choose to pay $400 and throw away the $10 ground package. That practice would be inconsistent with the basic justification for tour-basing fares and would doubtless be disapproved by the Board. Such disapproval would rest, however, upon a determination that the *air fare* was too low in light of the conditions on its availability. It would not rest on an evaluation of the cost justification for the ground package or upon any other evaluation of the ground package in ratemaking terms.

were exact duplicates of the tours offered by Foremost; misrepresented to travel agents and prospective travelers that its tours were actually those of Foremost; sold tours below their actual cost for the purpose of saturating the market in order to eliminate Foremost as a competitor and to monopolize the market in the South Pacific; contrary to agreement, refused to deal with or provide air transportation to Foremost's customers; misappropriated business intended for Foremost by inducing actual and prospective customers of Foremost to switch to Qantas' tours; disparaged Foremost and interfered with Foremost's contracts and employees and induced parties with whom Foremost had made contracts to breach those contracts. The complaint alleged that Qantas engaged in these activities with predatory intent to injure and to eliminate Foremost as a competitor in the South Pacific markets and that, because of Qantas' actions, Foremost was in immediate and substantial danger of being eliminated from business (Pet. App. 55a-73a). Accordingly, simultaneously with the filing of the complaint, Foremost filed a motion for a preliminary injunction.

3. The district court, after hearing evidence, granted a preliminary injunction and denied Qantas' motion to dismiss the complaint (Pet. App. 30a-52a). The court found that Qantas was selling the land services portion of its inclusive tours "below cost" (Pet. App. 36a-37a, 48a, n. 8) and that such sales, together with other anti-competitive actions established a *prima facie* violation of the antitrust laws (Pet. App. 48a). However, the court also recognized that substantial portions of the complaint dealing with alleged unfair and deceptive practices were within the primary jurisdiction of the Civil Aeronautics Board under Section 411 of the Federal Aviation Act (49 U.S.C. 1381). And although the court rejected Qantas' contention that the Board's primary jurisdiction warranted dismissal of the complaint, it

held that the intermixing of matters within and without the Board's jurisdiction justified a stay of all court proceedings while the Board considered the case (Pet. App. 43a-46a).

The court also rejected Qantas' contention that the pricing of "in-house" inclusive tours and related practices had been immunized from antitrust liability under Section 414 of the Act, 49 U.S.C. 1384, by a series of Board rulings. This contention rested on the Board's approval of various resolutions of the International Air Transport Association (IATA) establishing tour-basing fares and the conditions on their availability, including a minimum price for the ground package.[5] Following approval of the agreements, the carriers, including Qantas, had filed tariffs setting forth these fares and conditions. Qantas asserted that its pricing of the land package was above the tariff minimum and that the Board's approval of the underlying IATA resolution immunized the carrier from the application of the antitrust laws to its pricing and marketing practices.[6] The court concluded that the agency's review of the land tour components "was not sufficiently

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[5]Fares for scheduled international air transportation are fixed through the "conference machinery" of IATA, the trade association of United States and foreign air carriers authorized to engage in scheduled international air transportation. This machinery involves consultation and agreement between United States and foreign air carriers on rates and fares. The agreements specify the fares to be charged for limited periods of time and are subject to approval by the governments of the carriers involved. The Board approves such agreements under Section 412 of the Federal Aviation Act, 49 U.S.C. 1382, and the rates established by the agreements are then embodied in tariffs which are filed with the Board under Section 403 of the Act (Pet. App. 58a).

[6]While rejecting antitrust immunity, the district court did refer to the Board the question whether Qantas was violating its tariff obligations (Pet. App. 41a-47a).

specific" to confer immunity under Section 414 (Pet. App. 41a).

Finally, because the court found sufficient evidence of irreparable injury to Foremost and a likelihood that Foremost would prevail on the merits of the antitrust complaint, it issued a preliminary injunction which, *inter alia*, prohibited Qantas from selling inclusive tours until it satisfied the court that the price for land services reflected Qantas' costs for such services and from shifting to its own tours passengers who sought to purchase Foremost tours (Pet. App. 51a-52a).[7]

4. The court of appeals unanimously affirmed (Pet. App. 18a-29a). The court held that the district court had correctly referred the case to the Board because of its "substantial interest in this litigation * * *" (Pet. App. 26a). It agreed with the district court that retention of jurisdiction (though with the case stayed) was proper because the business activity which was the focus of the antitrust complaint, the tour industry, "is not *per se* regulated by the CAB * * *" (Pet. App. 24a). Similarly, the court held that the Board had not immunized Qantas' conduct when it approved the IATA resolutions because the Board's authority, and hence immunizing power, generally does not extend to that conduct (Pet. App. 25a). Finally, the court held that the district court had authority to issue a preliminary injunction and had used that power properly in this case (Pet. App. 27a-29a).

5. Meanwhile, Foremost filed a complaint with the Board alleging that the conduct set forth in the antitrust complaint violated the Federal Aviation Act and the Board's regulations (Pet. App. 74a-93a). On December 15, 1975,

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[7] Two months later the court, after a hearing to determine whether the price for the land services reflected costs, provisionally vacated this portion of the preliminary injunction (Br. in Opp. 4, 19).

the Board's Bureau of Enforcement docketed a Petition for Enforcement incorporating those parts of the complaint relating to practices in the sale of air transportation. The Bureau agreed to investigate charges that below-cost pricing of land services is a rebate of air fare in violation of Section 403(b) or an undue preference in violation of Section 404(b) and that Qantas' bait-and-switch selling is an unfair practice "in air transportation or the sale thereof" violative of Section 411 (Pet. App. 94a-97a). On the other hand, the Bureau expressly declined to incorporate those parts of the complaint that were limited to Qantas' inclusive tour packaging activities and which did not affect the sale of air transportation, finding that it had no reason to believe that Qantas' "tour operator activities" were "air transportation services" (Pet. App. 105a).

DISCUSSION

The order of the district court—referring the case to the Board for the exercise of its primary jurisdiction while issuing a preliminary injunction to prevent irreparable injury to Foremost—reflects a proper accommodation of the respective roles of court and agency that comes well within the principles of this Court's decisions. The case presents no issue warranting review.

1. Qantas argues (Pet. 15, 16) that *Pan American World Airways* v. *United States*, 371 U.S. 296, "as a matter of jurisdiction," required the district court to dismiss Foremost's complaint in its entirety.

In *Pan American* this Court ordered an injunction vacated and the complaint dismissed in a civil antitrust action which challenged agreements by Pan American and another carrier to allocate routes and divide territories. The Court, while recognizing that the Board did not have exclusive jurisdiction over "every

antitrust violation by air carriers," 371 U.S. at 312, nevertheless held that certain activities, such as carrier route allocations and territorial divisions, were so "basic" to the regulatory scheme, 371 U.S. at 305, that operation of the antitrust laws must be displaced. Where such relationships and practices were placed under pervasive Board regulation, the Court said, Congress intended that administrative regulation, including the remedies available under Section 411, should supplant the normal play of market forces otherwise protected by the antitrust laws. 371 U.S. at 305, 310.

The matters raised by the antitrust complaint in this case, by contrast, are not "basic" to the regulatory scheme. The complaint did not challenge air fares or routes approved by the Board but rather claimed that Qantas had illegally attempted to eliminate competition in the packaging of inclusive tours, in part by misrepresenting its tours as those of Foremost and in part by selling land services below cost. Although petitioner claims that inclusive tours are "pervasively regulated by the CAB" (Pet. 14), this claim, as we have already discussed (pp. 2-3, *supra*), is inaccurate. The Board is not purporting to investigate all aspects of the packaging of inclusive tours; its interest in the price and other terms of the ground package of the inclusive tour in this case is with tariff-related matters (including the question whether petitioner's alleged below-cost pricing constitutes a disguised rebate of the fare for the air transportation), and with competitive practices.[8]

The fact that the Board has accepted jurisdiction over some matters raised in the antitrust complaint does not mean that the antitrust laws are inapplicable. The

[8]Of course, the Board's concern over the fare for the air transportation portion is no different from its concern with any other air transportation fare.

decision of the Board's Bureau of Enforcement—agreeing to investigate possible violations of Sections 403, 404, and 411 of the Act but declining to investigate matters not sufficiently connected to air transportation services—reflects the limited nature of the Board's concern and jurisdiction, and allows proper latitude for the operation of the antitrust laws. Although the challenged conduct may constitute an unfair practice in the sale of air transportation, subject to review by the Board under Section 411, that fact does not mean that the district court is deprived of jurisdiction. See *Nader* v. *Allegheny Airlines*, No. 75-455 (decided June 7, 1976).[9]

Finally, the preliminary injunction issued by the district court does not interfere with the Board's performance of its functions. Unlike the divestiture order in *Pan American*, which threatened to put the court and the agency in conflict, 371 U.S. at 309-310, this very limited injunction requires only that Qantas provide land services at a price which actually covers its costs (Pet. App. 51a).[10] The injunction does not restrict the agency's flexibility or discretion. The district court explicitly disavowed any such intent,[11] and emphasized that it would modify the

[9]*Nader* also precludes petitioner's argument (Pet. 16) that *Pan American*, as interpreted in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 380, makes Section 411 the exclusive remedy for any conduct falling within its scope.

[10]Thus, the injunction did not operate in any way to alter or suspend Qantas' tariff obligations; the tariff, which merely sets forth a *minimum* cost for land services, remains as it was before the injunction was issued. Hence, there is no merit in Qantas' claim (Pet. 19-21) that the injunction suspends a tariff contrary to the decisions of this Court in *Arrow Transportation Co.* v. *Southern Railway*, 372 U.S. 658, and *United States* v. *SCRAP*, 412 U.S. 669.

[11]The district court stated that its retention of jurisdiction "is not to be interpreted as manifesting any intent * * * to restrict the scope of CAB's investigation and of rulings upon * * * the issues" (Pet. App. 50a).

preliminary injunction to conform with any exercise by the Board of its exclusive rate-making powers (Pet. App. 46a-47a, n. 7).[12]

2. There is also no reason for further review of Qantas' claim (Pet. 18-19) that this decision conflicts with *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363. In *Hughes Tool* the Court held that the Board had conferred antitrust immunity upon aircraft sales and leases to TWA, since the Board had given specific consideration to each transaction and to its effects as part of a continuing review of Hughes Tool's control of TWA. Qantas asserts that the Board's approval of IATA-agreed minimum rates for land services amounts to a comparable approval.

Any similarity between this case and *Hughes Tool*, however, is more apparent than real. The Board in *Hughes Tool* had required, as an express condition for permitting control of TWA by Hughes Tool under Section 408, that each inter-corporate transaction of specified size receive Board approval. As the Court noted: "Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were 'just and reasonable and in the public interest' " (409 U.S. at 379). No such review occurred here. The Board did not analyze in any detail the land services to be offered by Qantas but considered them only to the extent necessary to assure that the conditions for availability of the tour-basing air fare had been met. It did not scrutinize, let alone deliberately approve as being in the public interest, the allegedly below-cost pricing practices which

[12]Additionally, the central feature of the preliminary injunction was subsequently vacated by the district court on a provisional basis (see n. 7, *supra*).

are part of the subject matter of the antitrust complaint and the preliminary injunction.[13]

3. Finally, we see no merit in petitioner's contention (Pet. 21) that the district court was without power to issue temporary injunctive relief pending review by the Board. As a general matter, where a court may retain jurisdiction of a case pending reference to an agency, it should be able to exercise its traditional equitable powers to protect its own jurisdiction. See Jaffe, *Judicial Control of Administrative Action*, 656-657 (1965); *Brawner Building, Inc.* v. *Shehyn*, 442 F. 2d 847 (C.A. D.C.). Circumstances may exist, of course, in which the granting of temporary relief would be irreconcilable with referral to an agency or would cause friction between the judicial and administrative processes; those potential problems do not constitute a jurisdictional bar to injunctive relief but are properly part of the determination whether issuance of an injunction is in the public interest. See *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F. 2d 917, 924 (C.A. 3).

In this case the district court specifically found that an injunction was necessary to prevent extinction of Foremost as a competitor in the inclusive tour business and provided that it would terminate any part of the injunction on which the Board took parallel action. Pet. App. 47a. That is a reasonable and desirable accommodation of the interests involved.

The cases cited by petitioner (Pet. 21-23) do not stand for a contrary *per se* rule. While language in *S.S.W., Inc.*

[13]Review by the Board of activities alleged to constitute unfair and deceptive practices under Section 411 does not provide a basis for immunity from the antitrust laws. "No power to immunize can be derived from the language of §411." *Nader* v. *Allegheny Airlines*, *supra*, slip op. 10.

v. *Air Transport Ass'n of America*, 191 F. 2d 658 (C.A. D.C.), and *Laveson* v. *Trans World Airlines*, 471 F. 2d 76 (C.A. 3), might be read broadly to suggest that all injunctive relief is barred when a case is referred to an agency for consideration, neither case involved temporary, limited injunctive relief of the type granted here. The court in each of those cases was confronted with the question whether referral to an agency was appropriate in the first instance and not whether a district court could give intermediate relief to preserve its own jurisdiction during the agency's review. Indeed, both the Third Circuit and District of Columbia Circuit have since recognized that temporary relief may be granted in appropriate cases. ***Brawner Building, Inc.*** v. ***Shehyn, supra; Delaware River Port Authority*** v. ***Transamerican Trailer Transport, Inc., supra.***

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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